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SUPREME COURT OF THE

OCTOBER TERM,

No. 450

ANNIE SAUDER, Administratrix of the Estate of Peter Sauder, Deceased, ANNIE SAUDER, ALICE BLAIR STEARNS, ROBERT L. BLAIR, MYLES W. BLAIR, WILL M. MCLAUGHLIN, AS DOCTOR DIRECTOR, CHRIS TIE A. SAUDER, OLIVER J. SAUDER, AMOS W. SAUDER, LORINE F. SAUDER, [illegible] ANNIE SAUDER, HER MOTHER AND NEXT FRIEND, ALICE BELL SAUDER, HYBERT ALVIN SAUDER, RAY ARTHUR SAUDER AND LANE EVELYN SAUDER, MINORS, BY MRS. SAUDER, THEIR MOTHER AND NEXT FRIEND, PETITIONERS,

v.

MID-CONTINENT PETROLEUM CORPORATION, A CORPORATION, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, TENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

[illegible]

Harry W. Colbert,

[illegible]

[illegible]

Counsel for Petitioners.

Dixon, Kirkpatrick, Colbert And Conner,

Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 660

ANNIE SAUDER, ADMINISTRATRIX OF THE ESTATE OF PHILIP SAUDER, DECEASED; ANNIE SAUDER, ALICE ELSIE STRAHM, SOPHIE E. ELROD, LILLIAN F. PINON, EMMA M. MEAGHER, GEORGE D. SAUDER, CHESTER A. SAUDER, OLIVER J. SAUDER, HAROLD W. SAUDER, LORENE I. SAUDER, A MINOR, BY ANNIE SAUDER, HER MOTHER AND NEXT FRIEND; GRACE ANNABELL SAUDER, EVERETT ALVIN SAUDER, RAY ARTHUR SAUDER AND IRENE EVELYN SAUDER, MINORS, BY MINA SAUDER, THEIR MOTHER AND NEXT FRIEND, PETITIONERS,

vs.

MID-CONTINENT PETROLEUM CORPORATION, A CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petition of Annie Sauder, Administratrix of the Estate of Philip Sauder, deceased; Annie Sauder, Alice Elsie Strahm, Sophie E. Elrod, Lillian F. Pinon, Emma M. Meagher, George D. Sauder, Chester A. Sauder, Oliver

J. Sauder, Harold W. Sauder, Lorene I. Sauder, a minor, by Annie Sauder, her mother and next friend; Grace Annabell Sauder, Everett Alvin Sauder, Ray Arthur Sauder and Irene Evelyn Sauder, minors, by Mina Sauder, their mother and next friend, respectfully shows to this Honorable Court:

A.

Summary Statement of Matter Involved.

The petitioners are the heirs at law of Philip Sauder, who brought this suit to cancel the undeveloped portion of an oil and gas lease on 360 acres of land located in Greenwood County, Kansas (E ½; and SE ¼ SW ¼, Sec. 16, Twp. 23 South, Range 13 East) for failure to explore and develop, which lease, by mesne assignments, had passed to the respondent, Mid-Continent Petroleum Corporation, a Delaware corporation.

The trial court entered a decree canceling said lease except as to a tract 860 feet east and west, and 400 feet north and south located in the SE ¼ SW ¼, on which two producing wells had been drilled (R. 42-4). On appeal, the United States Circuit Court of Appeals, Tenth Circuit, reversed said decree without prejudice to the bringing of a new suit in the event changed conditions should indicate a breach of the implied covenant to develop. Circuit Judge McDermott dissented in a written opinion (67 F. (2d) 9, 13).

The question involved is whether the respondent lessee had breached its implied obligation to develop and explore (R. 46).

The lease, dated June 6, 1916, granted "the exclusive right" to enter upon, operate for and procure oil and gas, for 10 years from date "and as long thereafter as oil and gas *can* be procured thereon in paying quantities." The

lease provided that the lessors were to receive ⅛ of the oil realized, gas for domestic purposes, $100.00 per well per year during the time gas should be sold or marketed, and that if oil or gas be found on the premises all rights, benefits and obligations should continue so long as either could be procured in paying quantities (R. 6-8).

On November 1, 1921, and January 1, 1922, during the primary term of the lease, predecessors of the respondent completed two wells in the SE ¼ SW ¼ Sec. 16, which have ever since produced oil in paying quantities. These were offset wells to producing wells located in the NW ¼ of Sec. 21 and the SW ¼ of Sec. 16 (R. 23). There has been no further drilling on the Sauder lease during the 17 years since its execution (R. 22, 34, 48; Exh. 1, R. 67).

The petitioners' evidence proved the location, date of drilling, depth and initial production of the wells drilled on land bordering upon the land involved. It showed, and the court found, producing wells, as follows: *To the North and East*—in the SW ¼ of Sec. 10—16 wells; *To the East*—in the half section lying immediately east of the half section involved, being W ½ of Sec. 15—25 wells; *To the Southeast*—in the NW ¼ of Sec. 22—12 wells; *To the South*—on the half section lying immediately south of the land in question, being N ½ of Sec. 21—10 wells; *To the Southwest*—in the NE ¼ of Sec. 20—6 wells; *To the West*—in the SW ¼ of Sec. 16 and the SE ¼ of Sec. 17—7 wells. There are also two other scattered wells to the West and two to the North of the land in question. None of these wells is within 400 feet of the land in question except those to which the two wells in the SW ¼ of Sec. 16 are offsets. They are within 200 feet south and west thereof (Exh. 1, R. 67, 35).

Defendant's Exhibit E (R. 77) also shows these additional producing wells: 10 in the SE ¼ of Sec. 10; 18 in the East half of Sec. 15; 5 in the NE ¼ of Sec. 22; 11 in

the South half of Sec. 21; and approximately 40 in a southwesterly "trend" from the Sauder lease in Sections 20, 29 and 32. The East half of the Sauder lease is the only tract in a "trend" running northeasterly and southwesterly for a distance of 5 miles which does not have oil production (R. 56-7).

The respondent owns and is operating the SW ¼ of Sec. 15, lying East of the land in question, containing thereon 9 producing wells; also the NW ¼ of Sec. 22, lying Southeast of the land in question, with 12 producing wells thereon, and the North half of Sec. 21, lying immediately South of the land in question, with 9 producing wells thereon (Exh. 1, R. 67).

The wells to the East of the Sauder lease are producing from the Bartlesville sand which is found in long, narrow strips averaging about 3 well locations (a width of 460 feet per location) (R. 51). The best wells were had by drilling in the middle or crest of this sand and the locations to the West toward the East side of the Sauder lease, or to the East in the opposite direction, showed the sand to be thinner with more water and less oil (R. 51, 55, 60).

The wells on the Sauder lease and those to the South and West are producing from the Mississippi lime, which underlies the Bartlesville sand (R. 51, 55, 60-1-2, and 64). A geologist, who had never been on the lease involved, gave as his opinion that there was an absence of oil in paying quantities in the Mississippi lime underlying the Sauder lease, for the following reasons: (1) Said lime formation produces oil at a higher point and is barren of oil at its lower points; that is, the oil is found where the lime is near the surface (R. 61); (2) The formation dipped in every direction except from the Northwest to the Southwest (R. 61); (3) Wells encountered in the lime at a greater depth than 570 feet below sea level in the vicinity of the Sauder lease were usually dry holes or produced oil in

negligible quantities (R. 60-1; Exh. E, R. 77); (4) Three dry holes were drilled near the Sauder lease, one in the SE ¼ of Sec. 9, 1,880 feet North of the North line and 200 feet West of the East line extended of the Sauder lease; one in the NW ¼ of Sec. 16, 630 feet West of the West line and 290 feet North of the West line of the Sauder lease, and 290 feet North of the center line of Sec. 16; another in the SW ¼ of Sec. 16, 200 feet West of the West line and a thousand feet North of the South line of the lease; and a well in the SW ¼ of Sec. 15, 750 feet East of the East line of the Sauder lease did not produce oil in paying quantities. The two wells drilled in the Sauder lease reached the lime at 558 and 574 feet respectively (R. 77; Exh. E).

The lime under the Sauder 320 acres is from 570 to 610 feet below sea level and much of the South half is between 570 and 590 feet below sea level (R. 77; Exh. E). In the section adjoining on the Southwest (E ½ of Sec. 20 and W ½ of Sec. 21) there are 23 producing wells where the lime is between 570 and 610 feet and 9 wells higher than 570 feet. In Sec. 29, lying next further Southwest, there are 20 producing wells between the 570-610 feet range and in the field adjoining on the Northeast there are 17 producing wells within the 570-610 feet range and 3 higher than 610 feet. There are dry holes between 590 and 610, but there are also dry holes as high as 564 feet (Exh. E, R. 77).

The respondent, defendant below, introduced opinion evidence of its Vice-President in charge of production, its District Superintendent in charge of production, a geologist in its employ, and the Superintendent of another drilling company to the effect that, taking into consideration the development both on the lease and surrounding leases, the cost of drilling and equipping a well, and the probability of encountering paying production and other available facts, that no prudent operator would have drilled

another well on the Sauder lease (R. 51, 55-6, 61, 64-5). The Vice-President testified that the dry hole at Theta well No. 2, located 1,880 feet North of the North line of the Sauder lease, and the small production at Viola M. Briglin "B", No. 1, 760 feet South of the South line of said lease, tended to prove that oil did not exist in paying quantities under the Sauder lease (R. 50). Generally these witnesses testified as to their opinion founded on practical experience and watching developments, but stated that their theories might be wrong; that they did not want to tell the court that they could tell where there was oil; and that if a well had been drilled in the middle of the lease involved, information could have been secured which was not now possessed and such information might change the facts upon which their theories and conclusions were based; and that the only way to be absolutely certain as to whether there were any oil in the lime under the involved half section was by drilling a well (R. 54, 56-7, 62-3); that oil had been produced in Greenwood County for years (R. 58).

The defendant's evidence also showed that the half section in question was worthless from the standpoint of future development; that if it were later developed that production could be obtained, the defendant would be willing to develop it; but the purpose of the defendant was to hold the lease without any further development, or until somebody else developed something or until it gained information itself, but it had no immediate intention of developing the lease involved; and that its geological record showed that the Northwest corner of the lease had not been developed as thoroughly as around the edges of it, and that it was not impossible of further development in that Northwest corner (R. 52-3).

After stating that the defendant's expert witnesses had testified positively that in their judgment none of the production adjacent to the Sauder lease was draining any

oil therefrom, but admitted that they might be mistaken as there was no absolute way of determining the drainage except by drilling tests, the trial court found:

> "This evidence as to drainage is not wholly convincing to the court. There is, in the opinion of the court some probability that damage is being done to this leasehold by drainage to the adjoining properties;" (R. 35).

After stating that the plaintiffs contended that a well-defined "trend" of oil producing sand and lime runs in a southwesterly-northeasterly direction under and across the land described in said lease, and that the defendant's expert evidence tended to prove that no such "trend" exists under said land, but that on the contrary the oil sand is not to be found thereunder and the lime is at such depth that the probabilities are that no oil would be found in it, the court found:

> "On this point the court is unable to determine the facts but finds that no positive evidence having been introduced by either party as to this contention of plaintiffs, that nothing but exploration and positive tests by drilling upon said land can settle the controversy as to whether oil and gas in paying quantities can be found upon said land. Neither the defendant, nor any of its predecessors in title, have drilled any well on the East half of Sec. 16, but no dry well has been drilled on any of the property covered by said lease" (R. 36).

The court further found:

> "That on June 16, 1926, Philip Sauder wrote a letter to the defendant company calling attention to the ten year term, that no wells had been drilled except the two heretofore mentioned and demanded that the defendant proceed to explore and develop by the drilling of additional wells or release its claim to all of the

land except that part on which wells had been drilled and were producing oil. On June 25, 1926, the company replied that it considered said lease a valuable one and would not surrender it (R. 36).

"No effort has been made by the defendant and its officers and employes toward exploration or development and the evidence in this case shows that the defendant and its officers and employes have no present intention of further exploring or developing said lease and no intention of ever developing said lease unless and until further developments in the immediate vicinity thereof might convince said defendant that it would pay the defendant to further explore or develop said lease (R. 36).

"Evidence of the defendant tends to show that the land covered by the lease is worthless for drilling purposes * * *. If the lease is worthless, as contended by defendant, it is neither equitable nor just to permit the defendant to continue to hold the lease except as upon the 10 acres where the two offset wells are located.

"I think the question of the defendant's diligence in exploring the premises is of paramount importance. * * * I am compelled to conclude that the defendant has not shown that diligence in exploring and developing the land in question as is required under the law, equity and good conscience" (R. 37-40).

And concluded as a matter of law that:

"The defendant and its predecessors in title have not in good faith and with reasonable diligence explored and developed the lands described in this lease in accordance with the express and implied covenants of said lease.

"It would be inequitable and unjust to permit the defendant to hold, keep, and retain the leasehold property involved herein without further exploration or development, as said defendant proposes to do, as shown in the pleadings and evidence herein" (R. 40).

The Circuit Court of Appeals held that there was an implied covenant on the part of the lessee to drill such wells as under the circumstances an operator of ordinary prudence, having regard for the interests of both lessor and lessee, would drill; that the trial court did not find that the Petroleum Corporation had breached such implied obligations and that such a finding would have been wholly without support from the evidence (R. 95-6).

The Supreme Court of Kansas, in *McCarney* v. *Freel*, 121 Kan. 189, 246 Pac. 500 (decided June 12, 1926), had applied a different measure of diligence to the implied covenant to develop. There it held that a lessee could not hold a lease on 160 acres by drilling a single producing well, that there was an implied covenant fairly to exhaust the capabilities of the land and produce the minerals, and that if the undeveloped part will not produce minerals in paying quantities, and the lessee is not justified in drilling more wells, he cannot continue to hold by virtue of a provision in the lease extending the term to so long as oil or gas be produced in paying quantities (R. 95).

The majority opinion held that the trial court's decision was predicated on *McCarney* v. *Freel* (*supra*) conceded by counsel to support the trial court, distinguished it from the case at bar because there the decree was predicated on a breach of the implied covenant whereas there was no breach in the instant case and further held that since *McCarney* v. *Freel* (*supra*) was decided long after the Sauder lease was entered into, that that opinion was not binding upon the Federal courts and, as that court could not subscribe to the doctrine of *McCarney* v. *Freel* because it imposed a greater obligation under the implied covenant to develop than is recognized by the great weight of authority or placed an obligation on the lessee not imposed by the lease contract, it would exercise its own in-

dependent judgment as a court of equity. It therefore followed and applied the principles announced by it in *Denker* v. *Mid-Continent Petr. Corp.*, (C. C. A. 10) 56 F. (2d) 725, a case decided in 1932 and involving an oil and gas lease on Oklahoma land (Brief pp. 24-25).

Judge McDermott, dissenting, held that the rights of a holder of an oil and gas lease constitute rules of property to be governed by decisions of the Kansas court; reviewed the Kansas cases both prior and subsequent to the execution of the Sauder lease, and held that *McCarney* v. *Freel* did not overturn any settled rule of property law in Kansas, but is in accord with the current of Kansas authority (R. 98-103), and that either before or after 1916, the date of the Sauder lease, the Kansas court would not permit a lessee to hold 320 acres of land for 17 years without exploration or development, and that the Federal Court should apply the Kansas law and cancel the undeveloped part of the lease (R. 103); that if he were wrong in his construction of the earlier Kansas decisions, the question was at least an open one at the time the interest in the real estate was acquired, and in that event the rights of the parties should be governed by the later decisions of the Kansas courts in 1918 and 1926 rather than by the later decision of the Federal court in 1932; that if the lessee of the Sauder lease were a resident of Kansas, the lessor would be entitled to cancellation, and that the majority was permitting a non-resident corporation to acquire a greater interest in Kansas real estate than a resident might acquire (R. 98, 104).

Judge McDermott further held that if the Kansas decisions are to be ignored the same result should obtain, because a prudent operator, having regard for the interests of the lessor as well as his own, ought not to hold 320 acres almost surrounded by oil wells, without drilling a test well,

and that in common fairness he ought to give the lessors a well or get off and let someone else drill it; that tying up a half section of land for 17 years without drilling a single exploratory well, and with no hope of one unless some other operator drills on adjoining land, does not square with "due regard for the interest of the lessor" and constitutes a breach of the implied covenant diligently to explore and develop (R. 105).

B.

Reasons Relied on for the Allowance of the Writ.

In an action to cancel an oil and gas lease on Kansas real estate, for failure to explore and develop, the Circuit Court of Appeals erred:

1. In deciding an important question of local law in a way which is in conflict with applicable local decisions, in that:

(a) It has refused to follow and apply the decisions of the Kansas courts, to the effect that the implied covenant in an oil and gas lease to fairly exhaust the capability of land to produce mineral, requires that developing be done by drilling, and that if the land will not produce minerals, or the lessee is not justified in drilling, he cannot continue to hold it by virtue of a provision extending the lease term so long as oil or gas be produced in paying quantities.

(b) While holding that the measure of diligence in developing an oil and gas lease was "that which, under the circumstances, an operator of ordinary prudence, having regard to the interests of both the lessor and lessee, would do," it has interpreted and applied that measure contrary to the rules of property law established by the decisions of the Kansas courts;

2. In refusing to subscribe to the decisions of the Kansas courts affecting title to real estate, because they impose a greater obligation under the implied covenant to develop an oil and gas lease than is recognized by the great weight of authority, it has departed from the accepted and usual course of judicial proceedings and created a conflict of decisions with the Eighth Circuit as announced by it in *Thurlow* v. *Waite-Phillips Oil Co.*, 22 F. (2d) 781, wherein that court in an action affecting title to an oil and gas lease on Kansas land, followed the decisions of the Kansas court as controlling authority, even though said decisions, in its judgment, produced a patent and burdensome injustice;

3. In refusing to follow and apply the decisions of the Kansas courts affecting title to real estate; it decided an important question in a way probably untenable and in conflict with the weight of authority and of the principle announced by this court in *Edward Hines Trustees*, v. *Martin*, 268 U. S. 458, wherein it was held that Federal courts will follow the decisions of the state courts which have established a rule affecting title to real estate within the state;

4. That the decision of the Circuit Court of Appeals demonstrates how, since *Swift* v. *Tyson*, 16 Peters 1, 10 L. Ed. 865, the Federal courts have constantly increased the range of questions as to which they regard themselves not bound by the decisions of the state courts, and has brought about a situation where diverse citizenship, instead of preventing a discrimination against a non-citizen, results in a discrimination in his favor and against the citizen, and instead of making one law for all in a state makes different laws for a citizen and non-citizen accompanied by an increasing demand to abolish jurisdiction based on diverse citizenship. The result is such a bewildering confusion that the court should adequately define or limit such phrases as: "Rule

of property," "Local law," and "Questions of jurisdiction," to the end that the tendency of the Federal courts to depart from state decisions should be limited rather than extended further and to the end that there be uniformity of decision in the Federal and State courts.

C.

Questions Presented for Review by the Court.

The questions presented for review by the Court are:

1. Did the Circuit Court of Appeals err in refusing to follow, as the established law of Kansas, the principle that the implied covenant in an oil and gas lease to fairly exhaust the capability of land to produce mineral, requires that developing be done by drilling, and that if the land will not produce minerals or the lessee is not justified in drilling, he cannot continue to hold it by virtue of a provision extending the lease term so long as oil or gas be produced in paying quantities.

Wherefore, Your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding that court to certify and to send to this Court, for its review and determination, on a day certain to be therein named, a full and complete transcript of the record of all proceedings in the case numbered and entitled on its docket No. 773, Mid-Continent Petroleum Corporation, a Corporation, appellant, *v.* Annie Saunder *et al.*, appellees, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court of Appeals may be reversed by this Honorable Court and that

your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just. And your petitioners will forever pray.

ANNIE SAUNDER ET AL.,
By HARRY W. COLMERY,
RAY S. PIERSON,
BALFOUR S. JEFFREY,
Counsel for Petitioners.

DORAN, KLINE, COLMERY & COSGROVE,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

The Opinions of the Court Below.

The opinion of the United States Circuit Court of Appeals, Tenth Circuit (R. 91), sought to be reviewed is reported as Mid-Continent Petroleum Corporation *v.* Sauder *et al.*, 67 F. (2d) 9; the dissenting opinion of Judge McDermott, at page 13.

II.

Jurisdiction.

1. The date of the decree to be reviewed is September 14, 1933 (R. 91);

2. The claims advanced and rulings made by the Circuit Court of Appeals, here relied upon as the basis of this Court's jurisdiction, are as follows:

(a) The Circuit Court of Appeals erred in refusing to follow the Kansas decisions to the effect that the implied covenant in an oil and gas lease to fairly exhaust the capability of land to produce mineral, requires that developing be done by drilling, and that if the land will not produce minerals or the lessee is not justified in drilling, he cannot continue to hold it by virtue of a provision extending the lease term so long as oil or gas be produced in paying quantities;

3. The jurisdiction of this Court is invoked under Sec. 240 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. A. 347);

4. The cases believed to support the jurisdiction of this Court are:

Edward Hines Trustees v. *Martin,* 268 U. S. 458, 45 Sup. Ct. Rep. 543, 69 L. Ed. 1050;

Black & W. Taxicab Co. v. *Brown and Y. Taxicab Co.,* 276 U. S. 518, 48 Sup. Ct. Rep. 404, 72 L. Ed. 681;

Guffey v. *Smith,* 237 U. S. 101, 35 Sup. Ct. Rep. 526, 59 L. Ed. 856;

Hartford Ins. Co. v. *Railway,* 175 U. S. 91, 20 Sup. Ct. Rep. 33, 44 L. Ed. 84, 89.

III.

Statement of the Case.

The facts material to the matter involved and the issues raised in the Circuit Court of Appeals have been stated in the petition (Point A, pp. 2-11) which is hereby adopted and made a part of this brief.

IV.

Specification of Errors.

1. The Circuit Court of Appeals erred in refusing to follow the Kansas decisions which established the obligation of a lessee under an oil and gas lease to explore and develop.

2. The Circuit Court of Appeals erred in holding that there was no breach of the implied covenant to explore and develop (R. 96).

V.

ARGUMENT.

A. The Circuit Court of Appeals Erred in Refusing to Follow the Kansas Decisions Which Had Established the Obligation of the Lessee Under an Oil and Gas Lease to Explore and Develop.

1. *The Kansas decisions established the rule of law that there is an implied covenant in an oil and gas lease to*

fairly exhaust the capability of land to produce minerals, and that if the undeveloped portion will not produce minerals in paying quantities, and the lessee would not be justified in drilling more wells, he may not continue to hold by virtue of the provision in the lease extending the term so long as oil and gas is produced in paying quantities.

The above principle has been established by a line of decisions of the Supreme Court of the State of Kansas.

Mills v. *Hartz*, 77 Kan. 218, 94 Pac. 142 (1908), was an action to cancel a lease giving "exclusive right to dig, bore and mine for gas, petroleum oil and coal," for twenty years, and as much longer as said minerals were produced in paying quantities. Lessor was to receive a royalty per ton, gas for domestic purposes, and $50 per annum for gas obtained from each well. The lessee did no developing and, after 7½ years, this action was brought to cancel the lease for his failure to explore and develop. He contended that the lease did not provide for immediate exploration, but that he had twenty years to explore and develop. In sustaining the ruling of the trial court canceling the lease and the contention that the lease was granted upon an implied condition that the lessee should explore and develop within a reasonable time, the court stated the principles governing mineral leases as follows:

> "The only consideration moving to the lessor for the right which he gave to the lessee to explore and procure minerals was the royalty on the coal to be found and the fixed compensation for each well when gas should be found and utilized, together with sufficient gas to supply two stoves in his farmhouse. If there were no search, nor any product, no possible benefit could come to the lessor for the exclusive rights which had been given to the lessee. It is not easy to infer that the lessor intended to give a valuable right for a nominal consideration, and permit the lessee to

retain the right for a period of twenty years without development, when development was the chief purpose in the execution of the lease. Neither the character of the right given nor the nature of the instrument admits of such an irrational interpretation. The lease contemplates that the lessee shall proceed to dig and bore for gas, oil and coal, and that the lessor shall obtain gas for his farmhouse, not twenty years hence, but as soon as it can reasonably be procured."

l. c. 220.

In quoting from *Huggins* v. *Daley*, 40 C. C. A. 12, 48 L. R. A. 320, the court said:

"There is, perhaps, no other business in which prompt performance is so essential to the rights of the parties, or delays so likely to prove injurious—no other class of contracts in which time is so much of the essence."

"No such lease should be so construed as to enable the lessee who has paid no consideration to hold it merely for speculative purposes, without doing what he stipulated to do, and what was clearly in the contemplation of the lessor when he entered into the agreement."

l. c. 222.

In *Howerton* v. *Gas Company*, 81 *Kan.* 553, 106 Pac. 47, (1910), an action to cancel an oil and gas lease which provided that a well should be drilled in one year with one-tenth royalty of oil delivered to the lessor, and, if gas was found in paying quantities, $50.00 per year for each gas well, a gas well was completed within the year and the production had in commercial quantities sufficient to justify the expense of marketing, but failed to market the gas. In holding that this failure was equivalent to a failure to explore at all (560), the court stated principles and quoted from authorities as follows:

"It is unreasonable to suppose that it was understood that the completion of one well, without operation or production, except to furnish gas for the plaintiff's home, was all that the lessee was bound to do for more than four years, in which time, it might be fairly presumed, many wells would be drilled in near-by territory and gas marketed therefrom, as in fact actually occurred."

" 'Generally all leases of land for the exploration and development of minerals are executed by the lessor in the hope and upon the condition, either express or implied, that the land shall be developed for minerals; and it would be unjust and unreasonable, and contravene the nature and spirit of the lease, to allow the lessee to continue to hold under it any considerable length of time without making any effort at all to develop it according to the express or implied purpose of the lease; and, in general, while equity abhors a forfeiture, yet, when such a forfeiture works equity, and is essential to public and private interests in the development of minerals in land, the landowner, as well as the public, will be protected from the laches of the lessee and the forfeiture of the lease allowed, where such forfeiture does not contravene plain and unambiguous stipulations in the lease. This principle will be more readily enforced and applied by the court as to gas-and-oil cases because of the peculiar nature of those minerals and the danger of entire loss to the lessor of oil or gas in his lands by reason of well drilling on adjacent lands.' " 11 L. R. A.—n. s., 417.

l. c. 558, 559.

" 'In grants of the character in question, the title is inchoate, and for the purpose of exploration only, until oil or gas is found in quantities warranting operation; and while the courts manifest a disposition to protect the grantee at this stage by treating his interest as no longer postponed to the happening of a condition precedent, yet it is thoroughly settled that he can not omit to develop the property and hold the grant for speculative purposes purely.' "

"'The duty to develop the property upon the discovery of oil or gas in paying quantities is not to be regarded as a mere implied covenant, but, in a case like this, where practically the whole consideration must depend upon the implied undertaking, is to be treated as a condition subsequent.' (*Gadbury* v. *Ohio, etc., Gas Co.*, 162 Ind. 9, 14, 15.)"

l. c. 559, 561.

"'* * * The testing provided for in such case was of the very essence of the contract, not only with respect to the time within which it was to be done, but as to the thoroughness and certainty with which the mineral value of the lands should be ascertained. * * * The 'testing' provided for was manifestly a condition upon which the lease depended. If such test showed no minerals, then the contract was at an end; if it, on the other hand, showed the presence of valuable mines then the lessees were bound to operate them in good faith for the joint profit of themselves and the owners of the fee. * * *' *Petroleum Company* v. *Coal, Coke, and Manufacturing Company*, 89 Tenn. 381, 388, 389.)"

The court cancelled this lease, but, in subsequent decision, reversed the decree of cancellation and provided that the lessor should prove its damages at a trial, but that if it should be ascertained that such rule could not be applied, an alternative decree should be entered requiring the lessee to proceed, within a reasonable time, fixed by the court, to drill wells and protect the land leased and, upon his failing to do so, that the lease be cancelled. In this case, the court approved the principles hereinabove quoted from the first opinion. 82 Kan. 367, 108 Pac. 813.

In *Culbertson* v. *Cement Company*, 87 Kan. 529, 125 Pac. 81, (1912), although the facts are different, the following principle announced is applicable:

"Since the number of wells to be drilled on the land was not specified there was an implied obligation on

appellants to fully develop the land and put down as many wells as were necessary to secure to appellee his proportionate share of the pool of gas."

l. c. 535.

In *Day* v. *Kansas City Pipe Line Company*, 87 Kan. 617, 125 Pac. 43, (1912), a judgment was entered cancelling a gas lease. There were eight producing wells on two 80-acre tracts, included in a single lease covering 600 acres. Although the primary term had not expired, an action was brought to cancel the lease, and the decree cancelling the same as to 440 acres, upon which no wells had been drilled, was affirmed. The case is distinguishable in that there was an express covenant "to continue drilling as long as paying wells are found or royalties paid." The following statements are applicable:

"Appellant says that the lease does not expressly provide how many wells should be sunk on the land; that in the development two dry holes were drilled, and that it had reason to believe that further drilling would be attended with great risk and many dry holes be found, and as each costs a large sum of money it was not required to run that risk. It also says that the number of wells which shall be sunk on land is not to be determined by the landowners, nor yet by the courts; but is to be determined by the operator so long as he acts in good faith."

l. c. 622.

"The appellant was, of course, not required to develop land that had been tested and found to be unprofitable for operation, but if paying wells could not be found on the land or any part of it there is no reason why appellees' title should be longer clouded with a barren encumbrance nor any reason why appellant should resist a cancellation."

l. c. 623.

In *Alford* v. *Dennis*, 102 Kan. 403, 170 Pac. 1005 (1918), the lessor executed a lease in 1902 covering two tracts of land, one of 220 acres and one of 716 acres. There were twenty-five producing wells on the larger tract, but no exploration was made of the smaller. The primary term had expired. The Supreme Court stated that "it is not the province of the courts to end a contract merely because it is a bad bargain," that "the plaintiff asks the court to cancel this contract, to decree a forfeiture of it, and not for default of any expressed provision of the contract but merely for the default of one of its implied covenants. The instances are rare where equity will enforce a forfeiture. It will never do so where less drastic redress will satisfy the demands of justice." Then, citing its earlier decisions, the court said:

> "Unless the plaintiff's tract was to be developed some time there was no reason to include it in the lease, and as it stands it is of no value to defendants. Unless the defendants had a *bona fide* intention to prospect and develop this tract they had no proper purpose in leasing it, and to cancel the lease will do them no injury. While equity abhors forfeiture it likewise abhors injustice."
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> l. c. 406.

Thereupon, the court directed that the lease be cancelled as to the 220 acres unless the lessee developed it within a reasonable time.

In *Webb* v. *Croft*, 120 Kan. 654, 224 Pac. 1033, the primary term had expired. The lease covered 580 acres, and there was one producing well thereon. The closest development to the lease were two wells, each three-quarters of a mile away. The trial court entered a decree requiring the lessee to develop or cancel. The Supreme Court, in affirming said decree, held, upon the authority of its earlier decisions, that:

"Leases of this kind contemplate exploration and development and not the bottling up of land for speculative or other purposes or the postponement of reasonable development, nor yet the limiting of development to an extent merely to prevent a declaration of forfeiture. Although not expressly mentioned in the lease, there is an implied covenant or condition that there shall be reasonable development and such operation as will protect the interests of both the lessor and lessee. (*Howerton* v. *Gas Co.*, 81 Kan. 553, 106 Pac. 47; *Id.*, 82 Kan. 367, 108 Pac. 813; *Alford* v. *Dennis*, 102 Kan. 403, 170 Pac. 1005; *Harris v. Ohio Oil Co.*, 57 Ohio St. 118.) The lease is silent as to the number of wells that shall be drilled on the land, and in such a case there is an implication that there shall be reasonable development of the land by drilling such number of wells as an ordinarily prudent man would do under the circumstances, taking into consideration the results of the development and whether or not there was sufficient production to warrant the continuance of exploration and drilling."

l. c. 657.

"We think the court rightly concluded that the land of defendants has not been sufficiently developed. It would be grossly inequitable to hold a tract of 580 acres with no more development than has already been made. Plaintiff was entitled to some remedy for the failure to develop it, and we think it was competent for the court, instead of decreeing a cancellation of the lease, to give the defendants an opportunity to make reasonable development of the land pursuant to their implied covenants, as has already been determined in *Alford* v. *Dennis, supra.*"

l. c. 658.

McCarney v. *Freel*, 121 Kan. 189, 246 Pac. 500 (1926), was an action to cancel an oil and gas lease dated June 15, 1912, for ten years and as much longer as oil and gas could be produced in paying quantities. It embraced a

quarter section of land. In October, 1912, a well was drilled which produced and still was producing oil in paying quantities. In November, 1917, a dry hole was drilled. No further effort was made to develop, although there were numbers of producing wells drilled and in operation on surrounding land. In affirming the decree of cancellation, the court said:

> "Plaintiff's evidence warranted the inference that defendants have not reasonably developed her land, and have no present intention to do so. * * * The testimony in support of the defense was, a man would not be justified in drilling any more wells on plaintiff's land. The court canceled the lease, except as to a tract having a radius of 200 feet surrounding the producing well.
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> "The judgment was correct, whether based on plaintiff's or on defendants' theory of the case. A lessee may not hold an entire quarter section of land with a single producing well after expiration of term, any more than he may do so before expiration of term. The implied covenant fairly to exhaust capability of the land to produce mineral, subsists. If the undeveloped portion of the land will not produce mineral in paying quantities, and the lessee would not be justified in drilling more wells, he may not continue to hold by virtue of a provision in the lease extending the term so long as oil or gas may be produced in paying quantities."
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> l. c. 190.

The foregoing decisions constitute an unbroken line of precedent establishing the law of implied covenant to develop and explore an oil and gas lease in the state of Kansas, support the findings of the trial court and compel a result different from that arrived at by the Circuit Court of Appeals. It followed the rule that the measure of diligence is what, under the circumstances, an ordinary prudent operator would do, having regard to the interest

of both lessor and lessee, following its prior opinion in *Denker* v. *Mid-Continent Petr. Corp.* (C. C. A. 10, 56 F. (2d) 725), involving the cancellation of an oil and gas lease on land in Oklahoma. This was not the law in Kansas either before or after the execution of the Sauder lease. The Mills, Howerton, Culbertson, and Day cases (*supra*) established the principle contended for by petitioners prior to 1912. Immediately after the lease was made there came *Alford* v. *Dennis*, *Webb* v. *Croft*, and *McCarney* v. *Freel* (*supra*), in rapid succession and all without any intimation by the Kansas Supreme Court that there was even a scintilla of conflict with the earlier cases. They establish that there has been no change in the rule of property involved applicable to the instant case.

2. *The Kansas decisions, with reference to the obligation to explore and develop constitute rules of property, are binding on the Federal court and should be followed by them.*

The binding effect of state decisions in Federal courts has been the subject of much comment and extensive litigation since *Swift* v. *Tyson*, 16 *Peters* (U. S.) 1 (1842), 10 L. Ed. 865 (Note 1). But in announcing the doctrine of

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NOTE 1: A comprehensive view of comment and litigation may be obtained from a few citations: Warren, History of Federal Judiciary Act of 1789, 37 Harvard Law Review, 49; Pepper, The Border Line of Federal and State Decisions; William Trickett, The Non-Federal Law Administered in Federal Courts, 40 Am. L. Rev. 819; Frankfurter, Distribution of Judicial Power between United States and State Courts, 13 Cornell Law Quarterly, 499; Sharp and Brennan, The Application of the Doctrine of *Swift* v. *Tyson* since 1900, 4 Indiana Law Journal 367; Meigs, Decisions of the Federal Courts on Questions of State Law, 45 Am. L. Rev. 47; 1 Beale, Conflict of Laws (1916) Sec. 112*a*; Dobie, Federal Procedure (1928) Sec. 142; Note 40 L. R. A. (N. S.)

Swift v. Tyson, Mr. Justice Story, by specific languag excepted from its application, and left under the bindi effect of state decisions "* * *" rights and titles to thing having a permanent location, such as the rights and titl to real estate, and other matters immovable and intrate ritorial in their nature and character." *Swift* v. *Tyso* (*supra*) at page 18. That case further excepted the fiel of law governed by rules of a local nature and not pred cated upon general common law.

In Kansas, it has been held that an oil and gas lease co veys an interest in real estate. *Robinson* v. *Smalley*, 1 Kan. 842, 171 Pac. 1155; *Huston* v. *Cox*, 103 Kan. 73, 1 Pac. 992; *Brinkman* v. *Empire Gas and Fuel Co.*, 120 Ka 602, at 607, 245 Pac. 107.

(a) *The rule of property contended for was establishe by Kansas decisions prior to the date of the Sauder leas and should have been followed.*

It is submitted the line of Kansas decisions, cited abov and decided prior to the date of the lease in this case, hav established a rule of property, and action, in Kansas, whic should have been accepted by the Circuit Court of Appeal

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380; Note 71 A. L. R. 1102; Note 57 A. L. R. 435; *Kuhn* v *Fairmont Coal Company*, 215 U. S. 349, 30 Sup. Ct. 14 54 L. Ed. 228; *Guffey* v. *Smith*, 237 U. S. 101, 35 Sup. C 526, 59 L. Ed. 856; *Black & W. Taxicab Company* v. *Brow and Y. Taxicab Company*, 276 U. S. 518, 48 Sup. Ct. Re 404, 72 L. Ed. 681; *Hines Trustees* v. *Martin*, 268 U. S. 45 45 Sup. Ct. 543, 69 L. Ed. 1050. The result of the wide ex tension of the doctrine has led to serious proposals t abolish Federal jurisdiction based upon diversity of citizen ship. 15 A. B. A. Journal 401, and has led to suggeste legislation to require Federal Courts to follow state de cisions in all law except Federal questions. Senate Resolu tion 4333, 69th Congress, 1st Session. U. S. Daily, May 1928, page 585.

as binding upon its decision. *Warburton* v. *White*, 176 U. S. 484, 20 Sup. Ct. Rep. 404, 44 L. Ed. 555; *Abraham* v. *Casey*, 179 U. S. 210, 218, 21 Sup. Ct. 88, 45 L. Ed. 156; *Walker* v. *State Harbor Commission*, 17 Wall. 648; *Barrett* v. *Holmes*, 102 U. S. 651, 26 L. Ed. 291; *Bucher* v. *Cheshire Rwy.*, 125 U. S. 555, 8 Sup. Ct. 974, 31 L. Ed. 795; *East Central Eureka Company* v. *Central Eureka Company*, 204 U. S. 266, 27 Sup. Ct. 258, 51 L. Ed. 476; *Hartford F. Ins. Co.* v. *Chicago, M. & St. Paul R. Co.*, 175 U. S. 91, 44 L. Ed. 84, 89, 20 Sup. Ct. Rep. 33. A Federal court was held bound by Kansas state decisions as to whether an oil and gas lease of riparian land carries the right to drill in land formed by accretion. *Thurlow* v. *Waite-Phillips Oil Co.* (C. C. A. 8), 22 F. (2d) 781, certiorari denied 278 U. S. 598, 49 Sup. Ct. 8, 73 L. Ed. 528, and the decision of the state court upon a question peculiar to mining leases was followed in *Foster* v. *Elk Fork Oil & Gas Company*, 32 C. C. A. 560, 90 Fed. 178.

The exception to *Swift* v. *Tyson* has been extended to include questions relating to rights in personal property. *Dooley* v. *Pease*, 180 U. S. 126, 21 Sup. Ct. 329, 45 L. Ed. 457; *Bryant* v. *Swofford Co.*, 214 U. S 279, 29 Sup. Ct. 614, 53 L. Ed. 997.

In *Guffey* v. *Smith*, 237 U. S. 101, 35 Sup. Ct. 526, 59 L. Ed. 856, it was held where an oil and gas lease under the decisions of Illinois state court constituted an interest in realty, that the decisions of the highest courts of the state in which the property is situated are accepted and applied by the Federal courts as rules of property.

The attention of the Court is respectfully called to the decisions set out in the next point following, which are equally pertinent and applicable to the subject matter of this subdivision.

(b) That some of the Kansas decisions touching the principle contended for, were made after the Sauder lease was executed, does not compel a different result.

Judge Phillips, writing for the majority in the case at bar (R. 91), prefers to disregard the Kansas rule because three of the cases (*Alford* v. *Dennis*, *Webb* v. *Croft*, *McCarney* v. *Freel*, *supra*), the last of which it is admitted would decide this case if of effect in the Federal court, were decided after the lease between the parties was made (R. 96). That position was sought to be justified by the authority of *Kuhn* v. *Fairmont Coal Company*, 215 U. S. 349, 30 Sup. Ct. 140, 54 L. Ed. 228.

It is to be noted that in the case at bar there was a line of Kansas cases in existence before the lease was made, all of which established the Kansas rule contended for. In addition, there were two cases decided immediately after the lease was made, the language of which was very much in point, followed by the *McCarney* v. *Freel* case, all of which were decided from 14 to 6 years before *Denker* v. *Mid-Continent Petr. Corp.*, 56 F. (2d) 725, 84 A. L. R. 756, which is principally relied upon by the Circuit Court of Appeals in reaching its result in this case. The Denker case arose from the District Court of Oklahoma, and it is a fair inference that the trial court was applying Oklahoma law, and the citation of authorities in opinion of the Circuit Court, convinces that it was likewise. It cannot be the purpose of the Kuhn case to impose upon residents of Kansas the rule of property of Oklahoma, adopted by the Federal Circuit Court of Appeals, in a case arising from that state.

While th facts existed in the case at bar, the question certified in the Kuhn case was whether a single state decision, decided after the Federal action was brought, was decisive in an action in the Federal court. 215 U. S. at

356. It was held that the state decision did not bind the Federal court, which could decide the question according to its own law, but having regard for the state decision. Three Justices dissented from the doctrine and the result reached in that case.

In the Kuhn case, there was only a single state decision ruling on the proposition of law, and that made after the action in the Federal court had commenced. The rule of applying the state law in the Federal courts, where property rights are involved, has required that the state law be established. The Federal courts hesitate to follow a single or individual decision of the state courts, and prefer to follow a line of decisions establishing a rule. *Lane* v. *Vick*, 3 How. 464, 11 L. Ed. 681; *Chesko* v. *Delaware & H. Company*, 218 Fed. 804; *Pineland Club* v. *Robert* (C. C. A. 4), 213 Fed. 545, 556; *Lewis* v. *Alwood*, 228 Fed. 853.

It is a great distance from *Kuhn* v. *Coal Company* to the case at bar, and it must first pass the hurdle of the unanimous decision of this Court in *Edward Hines Trustees* v. *Martin*, 268 U. S. 458 (1925), 45 Sup. Ct. 543, 69 L. Ed. 1050, which was apparently not considered by the Circuit Court of Appeals. That case was an equitable action to remove a cloud on title to some real estate, and it was held that repeated decisions of the state courts, establishing a rule of property in the state, will be followed by the Federal courts without inquiry into the correctness of the rule as an original question.

In that case, the petitioners' title depended upon a patent issued June 27, 1871, and the defendant's title was acquired through a second patent of December 7, 1883, both patents being issued by the State of Mississippi. Thereafter, by cases decided in 1888, 1917 and two cases in 1924, the Supreme Court of Mississippi made decisions determining the law governing the rights and title to land pro-

ceeding from patents and situations similar to the Hines case. Mr. Justice Stone, writing for this Court, said:

> "But where the rule is one affecting title to real estate within the State and has been repeatedly determined by decisions of state courts so that it is established as the law of the State, there has been no departure from the rule that the federal courts will follow the decisions of the state courts. *Jackson ex dem St. John* v. *Chew, supra; Green* v. *Neal*, 6 Pet. 291; *Suydam* v. *Williamson*, 24 How. 427; *Walker* v. *The State Harbor Commissioners*, 17 Wall. 648; *Barrett* v. *Holmes*, 102 U. S. 651. And this is the rule even though the state rule is not approved. *Walker* v. *The State Harbor Commissions, supra; Bucher* v. *Cheshire Railway Co.*, 125 U. S. 555; *Balkam* v. *Woodstock Iron Co.*, 154 U. S. 177. To avoid the uncertainty and injustice which result from 'the discordant element of a substantial right and which is protected in one set of courts and denied in the other, with no superior to decide which is right' (*Brine* v. *Insurance Company*, 96 U. S. 627), this Court has not hesitated, when there has been a conflict of decision between it and the state courts affecting a rule of property within the State, to overrule its own decisions and to follow the state decisions, once it has become evident that they have established a 'rule of property' as the settled law of the State. *Green* v. *Lessee of Neal*, 6 Pet. 291; *Suydam* v. *Williamson, supra; Fairfield* v. *County of Gallatin*, 100 U. S. 47; *Roberts* v. *Lewis*, 153 U. S. 367, 376. And see *Bauserman* v. *Blunt, supra*, overruling a decision of the Circuit Court antedating a conflicting decision of the state court. We are, therefore, constrained in the present case to accept the view of the state courts as announced by them without inquiring, as an original proposition, into the justice and sufficiency of the rule which we follow" (l. c. 463, 464).

Although there was a state statute and its interpretation involved in the case, it was the decisions of the state

court that were held by this Court to be determinative of the issues in the Federal court. At page 462, Mr. Justice Stone said:

> "Both the meaning of statutes of a State and the rules of the unwritten law of a State affecting property within the State are peculiarly questions of local law to be ascertained and established by the state courts" (l. c. 462).

The Kuhn case was a tort action, affecting real property. The case at bar is an action involving a right and interest in and to real property. There is a real difference between the cases. Conflict between state and Federal decisions is not quite as serious in tort actions, for there, principles of general common law are usually determinative and, by the very nature of the cases, forecast cannot be made with any certainty as to what result might be reached. But conflict between state law and Federal rules, as applied in the same state where rights and interest to real estate are involved, is especially undesirable because predictability is and has been of paramount consideration. That distinction makes the *Edward Hines Trustees* v. *Martin, supra,* case closer to the case at bar for there is a near connection between an action to remove a cloud on title to real estate and an action to cancel a lease, both of which are different than a tort action even though the tort affects realty.

In Smith Purifier Company v. *McGroarty,* 136 U. S. 237, 10 Sup. Ct. 1017, 34 L. Ed. 346, the action was in equity and it was held that a certain mortgage, having been held by the Supreme Court of Ohio to be invalid against general creditors, must be held invalid in the Federal court. Mr. Justice Gray said:

> "The present case is to be decided by the application of the law of Ohio to the facts stated in this bill and

> admitted by the demurer; and the best evidence of that law, as affecting the validity of the mortgages and assignment, is to be found in the decisions of the Supreme Court of Ohio."

In that case, it appears that the mortgage and assignment was made in 1885, and the state decision relied upon was rendered in 1889, or four years after the rights of the parties had accrued, but at a time prior to the action in the Federal court.

(c) *Sound reason dictates the necessity of following the rule of property established by state decisions.*

Swift v. *Tyson* expressly excepted from the operation of its doctrine state decisions affecting rights to things having a permanent location in the state, cases involving rights and interest in real property, and questions of local law. The extensions of that case have been many, but to extend it under the authority of the Kuhn case to the case at bar works a confusion and doubt as to just what rights the parties may have, instead of securing uniform rules of law.

In place of safeguarding a non-resident from discrimination in matters of title to real property, the decision of the Circuit Court of Appeals in this case subjects the resident to a discrimination. In *Smith Purifier Company* v. *McGroarty, supra,* the court said:

> "It would be an extraordinary result, if the courts of the United States, in exercising the jurisdiction conferred upon them with a view to secure the rights of citizens residing in different States, should hold such a conveyance to be valid against citizens of other States as the Supreme Court of Ohio holds to be void as against its own citizens."
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> l. c. 241.

In *United States* v. *Cargill,* 258 Fed. 458, the court remarked:

> "For this court to refuse to follow the decisions of the Supreme Court of Arkansas would result in granting to noncitizens of the state, who can maintain action in the national courts, benefits not possessed by citizens of the state, and relief denied to the latter. This should be avoided, if at all possible."
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> l. c. 466.

As pointed out by Judge McDermott, dissenting in the case at bar (R. 98, 103-104), the effect of the decision in this case gives to a non-resident lessee greater rights than a resident lessee possesses under an oil and gas lease within the state of Kansas. If the lessors had leased the premises to a resident lessee, there could be no question in this case but that the lease should have been cancelled. The decision of the trial court was according to Kansas law. A non-resident should have no just cause of complaint if his rights are measured by the same law as that of residents when he comes voluntarily into the state and acquires an interest in or a claim to real estate.

Mr. Justice Holmes has aptly stated the case for Federal courts following state decisions in questions of title and interest to real estate.

> "The title to real estate in general depends upon the statutes and decisions of the State within which it lies. I think it a thing to be regretted if, while in the great mass of cases the state courts finally determine who is the owner of land, how much he owns and what he conveys by his deed, the courts of the United States, when by accident and exception the same question comes before them, do not follow what for all ordinary purposes is the law." *Kuhn* v. *Fairmont Coal Co.*, 215 U. S. 349, at 370.

In this connection, Judge Caldwell, in *Hartford F. Insurance Company* v. *Chicago, M. & St. P. R. Co.*, 70 Fed. 201, states "As a result of these diverse rules of decision, each party to a suit engages in an unseemly struggle to get into

that jurisdiction whose rules of decision are believed to be most favorable to his side of the case."

It has also been pointed out that, if a state should enact a rule of general law into statute, it would be the duty of the Federal court to apply that statute. Because a state law is announced by a decision of court, it should have no less effect than when it is announced by statute. See dissenting opinion of Mr. Justice Holmes, *Black & White Taxicab Co.* v. *Brown & Yellow Taxicab Co.*, 276 U. S. 518, 48 Sup. Ct. 404, 72 L. Ed. 681.

The result of the decision in this case by the Circuit Court of Appeals causes extreme embarrassment in the field of real property rights, title and interest where predictability is especially important. It is impossible to determine one's rights until it is determined in which court the action is to be brought. In addition, predictability is further reduced because of the difficulty of forecasting with any degree of certainty whether the Federal court will regard the precise question one of local or general law. *Kuhn* v. *Fairmont Coal Company, supra. Smith Purifier Company v. McGroarty, supra. Edward Hines Trustees* v. *Martin, supra.*

2. *The Circuit Court of Appeals erred in holding that there was no breach of the implied covenant to explore and develop.*

The majority of the Circuit Court took the position that *Webb* v. *Croft, supra,* was Kansas authority in support of the principle applied by it from *Denker* v. *Mid-Continent Petr. Co., supra.* Although it is true that in the opinion in that case reasonable development was referred to as "drilling such number of wells as an ordinarily prudent operator would do under the circumstances, taking into consideration the results of the development and whether or not there was sufficient production to warrant the con-

tinuance of exploration and drilling, yet in applying that test as the measure, the court still adhered to the rule that there must be development, and held that it was grossly inequitable to hold a tract of 580 acres with but one producing well thereon. Applying the principle of what an operator of ordinary prudence would do, with due regard for the interests of the lessor, the Kansas decisions hereinbefore set out will not permit the lessee to hold an undeveloped tract for speculation, without any intention to develop it, gamble on the future at the expense of his lessor, and use geologic science to condemn the lease as a justification for his failure to develop it diligently as being worthless and yet refuse to back up that scientific information by surrendering the lease and letting someone else try it. Under the principles of the Kansas cases, such conduct does not square with "due regard for the interests of the lessor" and constitutes a breach of the implied obligation to explore and develop. These principles are forcefully stated by Judge McDermott in his dissenting opinion (R. 104-5).

Moreover, the Circuit Court erred in stating that there was no finding that the Petroleum corporation had breached the implied obligation to develop. The trial court found specifically:

> "I think the question of the defendant's diligence in exploring the premises is of paramount importance. I am compelled to conclude that the defendant has not shown that diligence in exploring and developing the land in question as is required under the law, equity and good conscience."

The fact that the surrounding and bordering land contains many producing wells, the expressed intention of the Petroleum corporation not to further develop it, the admission that the northwest corner of the undeveloped half section was not impossible of further development, that the lime strata under the undeveloped half section is at a

depth range of 570-610 feet below sea level in which range the record shows 60 producing wells on land either bordering on the undeveloped portion or in the apparent southwesterly-northeasterly "trend" and the two producing wells in the southwest corner of the lease involved furnish ample evidence to support the finding of the trial court. Consequently, in its zeal to exercise its independent judgment in the face of an established rule of state property law, the Circuit Court failed not only to recognize the breach of the implied covenant but overruled the specific finding of the trial court, in support of which the record contains ample evidence.

Believing that in a suit to cancel an oil and gas lease, the implied obligation to explore and develop presents a rule of property law the decisions with reference to which should be binding upon the Federal courts, and that the Circuit Court of Appeals has both failed to follow Kansas decisions therein and to properly interpret and apply them, your petitioners earnestly submit that the United States Circuit Court of Appeals, Tenth Circuit, committed prejudicial error in its ruling in the matters hereinabove discussed, and that in view of the questions involved to the rights of your petitioners, and the fair and clear administration of justice, this Court should issue its writ to review and decide these questions.

Respectfully submitted,

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